No. 76-100

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

SOUTHERN RAILWAY COMPANY, *Petitioner,*

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION; W. J. USERY, JR., SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR; AFL-CIO; UNITED TRANSPORTATION UNION, *Respondents.*

REPLY OF PETITIONER SOUTHERN RAILWAY COMPANY

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This reply is submitted by petitioner Southern Railway Company ("Southern") in response to the opposition to certiorari filed by the Government.

The Government advocates a prolonged course of lower court litigation to "elucidate the proper contours of the statutory exemption" contained in § 4(b)(1) of the Occupational Safety and Health Act (Gov. Br. 9). That remedy offers no promise of authoritative judicial guidance and commits Southern and other railroads to

a multiplicity of administrative and judicial proceedings.

There are two questions of statutory interpretation involved here: what are the "working conditions" that are exempted from OSHA by an exercise of other regulatory authority; and what "exercise" of such authority results in such an exemption?

First, as to "working conditions": Contrary to the Government's belief (Gov. Br. 8), the lower courts are already hopelessly in conflict with respect to the scope of the exemption conferred by § 4(b)(1). The decision presented for review in this case rejects the analysis of the Government parties as well as ours and is compatible with no other decisional view of the statute.

The Government errs in viewing the "environmental area" formulation of the court below as mere *dictum* (Gov. Br. 6, 8). The court in fact held that the "working conditions" exempted by § 4(b)(1) are "environmental areas" within which an agency other than the Secretary of Labor has exercised statutory authority (App. 10a). That interpretation is not "consistent" (Gov. Br. 7) with the recent decision in *Southern Pacific Transportation Co.* v. *Usery*, 539 F.2d 387 (5th Cir. 1976), in which the Fifth Circuit adopted a position resembling in some respects the Secretary's theory of hazard-by-hazard exemption.[1] And it is most assuredly not consistent with the decision of the court that has held the exercise of authority by the Federal Railroad

[1] This decision, rendered September 22, 1976, affirmed the result reached by the Commission in the *Southern Pacific* case (App. 37a-62a). Southern, which operates in the Fourth, Fifth, Sixth, Seventh, and D. C. Circuits, has thus become subject to obligations in the Fourth and Fifth that are inconsistent.

Administration ("FRA") sufficient to exempt "working conditions" consisting of all maintenance and repair shops in the railroad industry. *Dunlop* v. *Burlington Northern R.R.*, 395 F. Supp. 303 (D. Mont. 1975), *appeal docketed*, 9th Cir., No. 75-3184.

Moreover, although the Government sees in this case only the question of whether an industry-wide exemption exists (Gov. Br. 2, 7), we presented for certiorari the different question of whether FRA's regulatory activities have, in accordance with § 4(b)(1), resulted in an exemption for Southern's *maintenance and repair facilities.* Such an exemption may clearly exist even if other parts of the industry are subject to OSHA rules; indeed, the Secretary of Labor and the Occupational Safety and Health Review Commission have already recognized limited exemptions within the railroad industry (Pet. Br. 12, n.9; 16, n.15).

Second, as to the nature of the required "exercise": Our contention is not, as the Government suggests (Gov. Br. 7), that the statutory OSHA exemption is made operative merely by reason of FRA's unquestioned possession of authority to regulate occupational safety throughout the railroad industry. It is undisputed that FRA has exercised its authority to *some* extent; the issue is whether that exercise has been sufficient to trigger the exemption. The sufficiency of the exercise may well depend on the definition of the "working conditions" that are considered to be subject to that exercise and thereby made exempt from OSHA. Thus, the Government's contention that at the time of the decisions below, "FRA admittedly had not issued any regulations affecting working conditions of the types that were the subject of the citations" (Gov. Br.

10), presupposes an interpretation of the statutory term "working conditions" to mean "hazards"—an interpretation rejected by the court of appeals—and begs the real questions as to the meaning of "exercise."

The Government's difficulties in defending the lower court's decision here are perhaps attributable to the fact that the court rejected the analysis adopted by the administrative agencies in this case. Although the Secretary of Labor previously called the decision "unworkable" and saw in it a prescription for chaotic litigation and impairment of the OSHA program, the Government parties now urge affirmance, arguing that deference should be accorded to an administrative agency's interpretation of its own governing statute (Gov. Br. 8).[2] Further, although the Secretary previously relied on the Act's legislative history, the Government now urges that its material portions be disregarded.[3] And in its new effort to defend the statutory interpretations devised by the court of appeals, the Government distorts their content beyond recognition and endorses even the court's obvious errors.[4]

[2] The Government's argument for deference here contrasts with the Secretary of Labor's practice of appealing Commission decisions with which he disagrees. The appellate courts have frequently reversed the Commission on questions of statutory interpretation. *See, e.g.*, Dunlop v. Haybuster Mfg. Co., 524 F.2d 222 (8th Cir. 1975); Brennan v. Chicago Bridge & Iron Co., 514 F.2d 1082, 1085 (7th Cir. 1975); Brennan v. Gilles & Cotting, Inc., 504 F.2d 1255 (4th Cir. 1974); *cf.* Brennan v. OSHRC and Gerosa, Inc., 491 F.2d 1340, 1344 (2d Cir. 1974) (regulatory interpretation). In any event, determining the limits of an agency's statutory jurisdiction is a judicial function. Social Security Board v. Nierotko, 327 U.S. 358 (1946); Stark v. Wickard, 321 U.S. 288, 309-10 (1944).

Moreover, the Commission, on whose behalf the Government now urges affirmance of the decision below, does not apply the "environmental area" test in railroad industry cases. *See* Secretary v. Penn Central Transportation Co., — OSAHRC —, 4 OSHC 1746 (Oct. 4, 1976); Secretary v. Southern Pacific Transportation Co., — OSAHRC —, 4 OSHC 1774 (Sept. 29, 1976).

The Government contends, for example, that under the "environmental area" test, FRA's recordkeeping and employee testing regulations do not represent an "exercise" sufficient to create an exemption here be-

[3] The Government now argues that the legislative history of § 4(b)(1), deliberately constructed by OSHA's sponsors and managers in the House of Representatives, should be disregarded because of the modest language change that occurred following House passage of the bill (see Pet. Br. 3 & 9, n.6). In other proceedings, the Secretary of Labor has successfully argued that the Perkins-Daniels-Erlenborn colloquy (Pet. Br. 9-10) is an important guide to the interpretation of § 4(b)(1) as enacted. *See* Organized Migrants in Community Action, Inc. v. Brennan, 520 F.2d 1161, 1167 (D.C. Cir. 1975), and Brief for Appellees therein, at pp. 13-14. Similarly, the remarks of Representative Steiger which the Government would now dismiss as "irrelevant" (Gov. Br. 10, n.7), have previously been recognized by the Secretary as part of the Act's useful legislative history. *See* Organized Migrants in Community Action, Inc. v. Brennan, *supra*, Brief for Appellees at pp. 14-15.

The legislative history bearing on § 4(b)(1) of OSHA is extensive and in our view unambiguous. The statute cannot be interpreted without reference to the intent of its authors, who well knew that they were drawing boundaries between regulatory programs.

[4] *E.g.*, Gov. Br. 9. We have previously pointed out that, contrary to the court's belief, FRA's expanded regulatory program as announced in March, 1975, applies to the Hayne Shop (Pet. Br. 13, n.11). The Government is well aware that the court simply misread FRA's advance notice on this point. Southern so advised the court on rehearing, but the court, in declining even to consider the state of FRA regulation after 1973, had no occasion to correct its mistake. There is, however, no justification for the Government's present insistence that the new FRA rules do not apply to the Hayne Shop and similar facilities.

cause "they do not purport to deal with the types of *working conditions* that were the subjects of the citations" in the present case (Gov. Br. 9; emphasis added). But the court below rejected such use of the statutory term "working conditions" to mean "hazards," and the Occupational Safety and Health Review Commission—one of the Government respondents in opposition here—has itself held that FRA's reporting and recordkeeping rules represent an "exercise" sufficient under § 4(b)(1) to exempt the entire railroad industry from similar OSHA requirements (App. 41a-43a). Our contention is that even under the test adopted by the court below, the "environmental area" of Southern's Hayne Shop is sufficiently pervaded by FRA regulation that an OSHA exemption exists for all work performed at the facility.

Finally, it needs to be recognized that the boundary between OSHA coverage and the specialized FRA regulatory program is dynamic, depending entirely on actions taken by FRA. As we have made clear in our petition, that agency has over the past two years expanded its regulatory program to a point where, even if an industry-wide exemption from OSHA has not been created, "environmental areas" throughout the industry have been removed from OSHA jurisdiction. The areas of exemption will surely grow. But in the absence of authoritative guidance from this Court, they will grow unpredictably and—from an employer's point of view—irrationally.

CONCLUSION

The important questions of OSHA coverage presented by this case can and should be resolved now. The petition for certiorari should be granted.

Respectfully submitted,

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